No. 97-372

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

—v.—

UNITED STATES SHOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* TOTES-ISOTONER CORPORATION, ET AL. (SUCCESSOR TO ARIS-ISOTONER, INC.), IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are companies which export merchandise through the ports of the United States, and have paid the Harbor Maintenance Tax that is in issue in this case, 26 U.S.C. § 4461. *Amici* have appeared in this capacity before the courts below.

The following companies are represented as *amici curiae*: Totes-Isotoner Corporation (successor to Aris-Isotoner, Inc.); Berwick Industries, Inc.; Chevron Chemical Company, Inc.; Chevron Chemical International Sales, Inc.; Chevron International Oil Company; Chevron Overseas Petroleum, Inc.; Chevron U.S.A., Inc.; Fieldston Clothes, Inc.; General Glass International Corporation; Microsoft Corporation; The Pillsbury Company; Rhone-Poulenc, Inc.; Uniroyal Chemical Company, Inc.; Xerox Corporation; Xerox Corporation, Americas Operations Division; Xerox Corporation, Southern California Manufacturing Operations Division; and Xerox International Partners.

The parties to this action have consented to the filing of this brief by *amici curiae*, in support of the respondent.

QUESTION PRESENTED

Whether the Harbor Maintenance Tax (26 U.S.C. § 4461(a)), by imposing an *ad valorem* tax on articles loaded at ports of the United States for exportation, violates the Export Clause of the United States Constitution.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-45a) is reported at 114 F.3d 1564. The decision of the United States Court of International Trade (Pet. App. 46a-89a) is reported at 907 F. Supp. 408.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The petition for a writ of certiorari was filed on August 29, 1997, and was granted on October 31, 1997 (118 S. Ct. 361). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions set forth in the brief of the parties are hereby adopted by *amici curiae*.

STATEMENT

Amici curiae Totes-Isotoner Corporation, et al. respectfully file this brief[1] on consent of all parties in support of respondent United States Shoe Corporation, urging affirmance of the decision below.

Amici curiae hereby concur with the Statement set forth in the Respondent's brief.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* hereby represent that this brief was authored by counsel for *amici curiae*, and was not, in whole or in part, authored by counsel for any party to this action. No person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The appellate court properly concluded that the Harbor Maintenance Tax (HMT), 26 U.S.C. § 4461, violates the Export Clause of the United States Constitution because it is an *ad valorem* tax on articles exported from the United States.

a. The Export Clause expressly and absolutely forbids the laying of taxes or duties "on Articles exported from any State".

b. The HMT is a constitutionally prohibited "tax" or "duty" within the common meaning of those terms. It is a revenue-raising measure which *de jure* burdens articles in export transit. The HMT is directly tied to the act of exportation and is assessed directly on the article exported.

Because the Export Clause imposes an absolute prohibition on Congress' power to burden exported articles, the stated Congressional purpose of any tax, duty, or other fee laid on exported articles is irrelevant to the question of whether the HMT is a prohibited "tax" or "duty" in the first instance. Congress may not avoid a constitutional restriction on its power through legislative declaration. Therefore, Congress' denomination of the HMT as a "port use" charge does not erase or justify the export-burdening effect of the tax. A statutory provision defining the exportation of a class of articles as "port use" may not be used to obscure the fact that the HMT directly burdens articles in the course of their exportation by assessing a value-based tax on the exported article itself.

c. Because the HMT directly burdens exported articles within the meaning of the Export Clause, it cannot be construed as a valid "user fee" imposed under Congress' Commerce Clause powers. The Export Clause's specific and express prohibition on Congressional taxation of exported articles may not be qualified by the regulatory powers granted Congress under the Commerce Clause. Therefore, even assuming *arguendo* that the HMT is non-discriminatory, is based on some fair approximation of use, and is not excessive with regard to any benefit conferred, it nevertheless constitutes an unconstitutional tax on exports.

d. The HMT does not meet the criteria for a user fee under the test enunciated in *Massachusetts v. United States*, 435 U.S. 444 (1978), as it is not based upon a fair approximation of use and is excessive with respect to any benefit conferred.

ARGUMENT

THE HARBOR MAINTENANCE TAX VIOLATES THE EXPORT CLAUSE OF THE CONSTITUTION

A. The Export Clause Imposes an Absolute Prohibition on Taxes or Duties Laid on "Articles Exported"

The Export Clause expressly and absolutely forbids the laying of taxes (or duties) "on Articles exported from any State". In *Pace v. Burgess*, 92 U.S. 372 (1875), this Court held that:

> the constitutional provision that "no tax or duty shall be laid to articles exported from any State" *absolutely*

> prohibits Congress from imposing a pecuniary charge on them, whether it consists of a tax or a duty . . . even if it has been asserted that these charges are only for the regulation of trade, and are not a tax or duty for the purpose of revenue.

(*emphasis added*). Further evidence that the Export Clause denies Congress the power to burden exported articles through taxes, duties, or assessments of any kind is revealed by examining the historical context in which the Clause was drafted.

The Export Clause was "one of the compromises which entered into and made possible the adoption of the Constitution." *Fairbank v. United States*, 181 U.S. 283, 290 (1901). Its supporters were concerned that, absent a ban on export taxation, exporting States would tax the produce of neighboring States. *See* 2 M. Farrand, *Records of the Federal Convention* (rev. ed. 1966) (Mr. Williamson, speaking of Virginia's taxes on exports of North Carolina's tobacco: "Should it take place, it would destroy the last hope of adoption of the plan") *Id.* at 360; (Mr. Butler was "strenuously opposed to a power over exports: as unjust and alarming to the staple States"). *Id.*

The Framers were equally concerned that the national government be denied the power to tax exports. *See* M. Farrand, *Records of the Federal Convention*, *supra*, at 307 ("Mr. Gerry thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially raising one and depressing another part of it"); (Mr. Sherman: "The complexity of the business in America would render an equal tax on exports impracticable", and "A power to tax exports would

shipwreck the whole".); *Id.* at 360 (Mr. Elseworth: "The produce of different states is such as to prevent uniformity in such taxes. there are indeed but a few articles as could be taxed at all; as Tobo. Rice & indigo, and a tax on these alone would engender incurable jealousies."); *Id.* at 361 (Mr. Sherman: "It is best to prohibit the National legislature in all cases".).

While some delegates to the Federal Convention believed taxation of exports to be an appropriate and in some cases essential governmental power[2], the Export Clause which emerged was a broad and absolute prohibition on export taxation.[3] Thus, as this Court

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[2] *See* 2 M. Farrand, *Records of the Federal Convention*, *supra*, at 307, 360 (Mr. Govr. Morris "considered the taxing of exports to be in many cases highly politic" (p. 307)), and expressed concern that "If no duty can be laid on exports, an embargo cannot be laid, though in time of war such measure may be of critical importance" (p. 360)).

[3] As the completion of the Convention's work neared, a late effort to permit export taxes in certain circumstances was defeated:

> The influence of the southern members in the work on the committee of detail has already been referred to in the provision[], that there should be no tax on exports . . . .

(continued...)

recently noted, there is "substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language". *United States v. International Business Machines Corp.*, 116 S. Ct. 1793, 1803, 135 L. Ed. 124 (1996) *("IBM")*.

Given the history of the Export Clause, this Court has taken pains to ensure that the broad prohibition of the Clause -- part of the cement binding our nation together -- is strictly protected from encroachments.

Thus, in *United States v. Hvoslef*, 237 U.S. 1 (1915), the Court noted that the Export Clause:

> . . . is a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of power should be construed as to give full efficacy to those powers and enable Congress to use such means

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[3](...continued)
When these questions came before the convention, the prohibition on export taxes was objected to, but more strenuously by the middle states than by New England. Madison suggested as a betterment of the situation that export taxes might be laid by a two-thirds vote. The proposal was lost and Massachusetts then supported the provision of the printed draft. The prohibition on export taxes was accordingly adopted and by a vote of seven to four.

M. Farrand, *The Framing of the Constitution of the United States*, at 148 (1913).

as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit and no legislation can be tolerated which, although it may not conflict with the letter, destroys that spirit and purpose of the restriction imposed. . . . "If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article [of] export, nor on all articles of export. In other words, *the purpose of the restriction is that exportation, all exportation, shall be free from national burden.*"

237 U.S. at 15 *(citing Fairbank*, 181 U.S. at 290) (*emphasis added).*

Recently, in *IBM*, this Court reaffirmed its consistent view that the Export Clause strictly prohibits *any* tax or duty falling on articles in the course of exportation. 116 S. Ct. at 1797. *IBM* confirmed that even taxes which *indirectly* fall on goods being exported are prohibited where they are in "in effect" or "in substance" a tax on exports because of their close relation or connection to the articles exported. *Id.* at 1804. *See Hvoslef*, 237 U.S. at 16 (taxes on ship charters); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915) (taxes on marine insurance). Such indirect impositions violate the Export Clause because they *burden* exportation in the same way as taxes which are laid directly on the goods themselves. *IBM*, 116 S. Ct. at 1797 (*citing Hvoslef*, 237 U.S. at 27); *Brown v. Maryland*, 25 U.S. (Wheat.) 419, 445 (1827).

In contrast to the Import-Export Clause [U.S. Const., art. I, Section 10, cl. 2] (prohibiting States from imposing "Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws"), the Export Clause broadly prohibits all "taxes" or "duties" on exports. *IBM*, 116 S. Ct. at 1801-02; *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290-93 (1976). The term "tax" as it appears in the text of the Export Clause is broad and unambiguous, making no allowance for non-discriminatory taxes or "user fees". In this regard, "the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all." *IBM*, 116 S. Ct. at 1803.

B. The HMT is a "Tax" Which is Imposed on, and Burdens, Articles in Exportation

The HMT is a revenue-raising measure which *de jure* burdens articles in the course of exportation. Because it is directly related to the export process and burdens exported articles by adding to the cost of their exportation, the HMT is unconstitutional under the Export Clause.

In *IBM,* this Court examined the meaning of the term "Articles exported", as used in the Export Clause. Citing *Pace v. Burgess* and other decisions,[4] the Court

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[4] *Turpin v. Burgess*, 117 U.S. 504 (1886) (federal excise tax on tobacco products); *Cornell v. Coyne*, 192 U.S. 418 (1904) (federal excise tax on filled cheese manufactured under contract for export).

acknowledged that the Export Clause does not insulate from taxation all goods which might eventually be exported. 116 S. Ct. at 1796-97.[5] Certain "nondiscriminatory *pre-exportation* assessments do not violate the Export Clause, even if the goods are eventually exported." *Id.* (*emphasis added*). However, such goods simply are not within the scope of the Export Clause because they are not "Articles exported".

On the other hand, this Court has never wavered from, and recently affirmed, the bedrock principle that "taxes levied on goods in the course of exportation and taxes directed *specifically* at exports" violate the Export Clause. *IBM*, 116 S. Ct. at 1797 (*citing Turpin v. Burgess*, 117 U.S. 504, 507 (1886) (*emphasis added*). The HMT violates the Export Clause on both counts. Moreover, "the Export Clause has been construed to strictly prohibit any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *IBM*, 116 S. Ct. at 1797. The prohibition also extends to certain services and activities that are "closely related" to the export process. *IBM*, 116 S. Ct. at 1798.

Articles held to be "in the course of exportation" include those which have been delivered to the exporting

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[5] For example, a non-discriminatory tax laid on the net income of a company engaged in the export business has been found not to violate the Export Clause because the articles taxed were neither "in the course of exportation" nor were they inherently or commercially export-related. *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 174 (1918).

carrier. In *A.G. Spalding & Bros. v. United States*, 262 U.S. 66, 70 (1923), the taxation of certain baseball equipment, to which title was transferred upon delivery to the export carrier, was found to violate the Export Clause. In short, once goods have moved from the manufacturing or inventory stage, and have entered the stream of export commerce, they cease to be "pre-export" articles and may not be taxed.

The HMT is levied on articles in the course of their exportation, according to the articles' value. It follows inexorably that the HMT is directed *specifically* at exported articles after they have entered the stream of export commerce, and hence violates the Export Clause.[6]

The statute imposes the HMT, "in the case of commercial cargo *to be exported* from the United States by water, at the time of loading"[7] on the exporting carrier. Congress has therefore targeted for *ad valorem* taxation articles "to be exported". The "taxable event", within the meaning of *Spalding* and *IBM*, is the loading of goods

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[6] It is particularly telling that, under Customs' implementing regulations [19 C.F.R. § 24.24(e)(2)(i)], the person liable for the payment of the export HMT is the person listed on the Shipper's Export Declaration or equivalent document as exporter. The nature and terms of any underlying commercial transaction which causes the exportation (i.e., sale, consignment) are irrelevant. All that matters is that "commercial cargo" is exported, and that the "exporter" thereby incurs liability for the HMT.

[7] 26 U.S.C. § 4461(c)(2)(A).

which are, according to Congress' own definition, in the process of exportation.

Congress' denomination of the HMT as a tax on "port use" does not obviate, much less justify, the export-burdening effect of tax. The Export Clause's absolute prohibition on Congressional taxation of exported articles renders irrelevant the stated purpose of any tax, duty, or other fee laid on exported articles. Congress may not avoid a constitutional restriction on its power through legislative declaration. *Fairbank v. United States*, 181 U.S. 283, 301 (1901) (discussing *Monongehela Navigation Co. v. United States*, 148 U.S. 312 (1893))[8]. Congress should not be permitted, by using the phrase "port use" to describe the exportation of a class of articles, to obscure the fact that the HMT directly burdens those articles in the course of their exportation, in violation of the Export Clause.

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[8] In this connection, it is significant that the HMT Act excludes from its definition of "port use" numerous activities which clearly constitute the use of port facilities in common meaning. The tax-exempted activities include lading of bunker fuels, ship's stores, sea stores or vessel equipment [26 U.S.C. § 4462(a)(3)(B)(i)], the landing of fish and aquatic animal life [*Id.*, § 4462(a)(3)(B)(ii)], the transport of cargoes by non-commercial vessels [*Id.*, § 4462(a)(4)(A)], ferry transportation [*Id.* § 4462(a)(4)(B)], and recreational port use. Indeed, in the absence of "commercial cargo", no tax is ever assessed. This illustrates that the HMT is nothing more than a tax which falls on a class of exported merchandise, to wit, "commercial cargo". *Id.*, § 4462(a)(3)(A).

This Court noted in *IBM* that it had never "carefully defined how [it] decides a particular federal tax is sufficiently related *to the goods or their value* to violate the Export Clause." 116 S. Ct. at 1801 n. 3 (*emphasis added*). This Court need not decide that question here, however, as the HMT by its terms, is triggered by the very act of loading cargo *for exportation* and assessed directly on the *value* of the export cargo, *irrespective of the level of port use*.[9] Therefore, Congress' denomination of the HMT as a tax on "port use" is completely irrelevant to question of whether it burdens articles in the course of their exportation.

Finally, no case cited by petitioner supports its proposition that *any* federal tax, charge or assessment *on the exported article itself* is permissible under the Export Clause. The cases cited by appellant addressed charges or assessments on the use of commercial facilities, as in *Massachusetts v. United States, supra* (tax on use of federal aviation facilities only), rather than a tax on "Articles

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[9] Even assuming *arguendo* that the HMT's *ad valorem* assessment scheme is in some way related to "port use", it is no less a tax on "articles exported". Moreover, this case does not implicate the concerns, voiced by the dissenting Justices in *IBM*, that the term "Articles exported" not be defined in an overbroad or vague manner, and thereby complicate a taxing agency's task of determining when an article has entered the stream of exportation, and whether the tax "burdens the exporting process". 116 S. Ct. at 1808 (Kennedy, J., dissenting). The HMT by *definition* applies to articles in the stream of exportation and burdens exports by taxing them directly.

exported". *See also Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972) (fee on use of airport facilities); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) (fee on use of airport by car rental agencies). The absence of any tax on exported articles in those cases undermines their precedential value here.[10]

Furthermore, where a tax or charge is not assessed on an "article exported", it proves nothing that certain courts have failed to condemn the *ad valorem* nature of the assessment[11]. If the tax or assessment is not imposed on the "article exported" (or is not closely related to the exportation process), then the Export Clause is not implicated, and the *method* of calculating the tax is irrelevant for purposes of this case.

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[10] To the extent the Court of Appeals determined that the HMT is tax on exports *because* it does not satisfy the criteria for a valid user fee set forth in *Massachusetts v. United States, supra*, its reasoning was faulty. The requirements for Export Clause protection are mutually exclusive from the *Massachusetts* user fee criteria. For instance, a non-discriminatory, indirect tax which burdens articles in the course of exportation cannot be a valid user fee, even if the user fee criteria are satisfied.

[11] *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). The *Sperry* case arose under the Constitution's Just Compensation Clause, not the Export Clause.

C. Congress' Regulatory Powers under the Commerce Clause do not Trump the Express Prohibitions of the Export Clause

The Export Clause expressly and unconditionally denies Congress the power to tax "Articles exported". Congress may not arrogate to itself the prohibited power by invoking its Commerce Clause power to regulate interstate and foreign commerce. *See IBM*, 116 S. Ct. at 1798-99.

Congress has power, under the Commerce Clause, to enact laws with the purpose of fostering and regulating interstate commerce. To this end, Congress may impose fees to recoup the cost of regulatory programs or to discourage certain activities. The Commerce Clause powers are subordinate to limitations contained in other parts of the Constitution. As noted in *North American Co. v. SEC*, 327 U.S. 686, 704 (1946) (*citation omitted*):

> For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce "is the power to regulate. . . ." This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I . . . .

The Commerce Clause cannot create an *exception* to the Export Clause's absolute prohibition, irrespective of purpose. A charge or fee may be acceptable under the Commerce Clause, *but only if* it does not fall on exported articles. For example, in *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), this Court upheld as a valid

exercise of the Commerce Clause a law requiring that common carriers charge all shippers, including export shippers, a uniform published rate. The law had a valid regulatory purpose (requiring that all shippers be treated alike). The Export Clause was not implicated because the law imposed a criminal penalty rather than a tax or duty. Nothing in the Court's decision suggests that the Commerce Clause limited the Export Clause prohibition in the name of federal regulation. *Armour Packing*, 209 U.S. at 79. Moreover, there was no federal assessment or charge placed *on the article exported* in that case. *See also Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967) (export certificate program regulating wheat prices did not implicate the Export Clause because there was no tax on articles in the course of exportation).

Finally, it is noteworthy that the framers of the Constitution, after adopting the Export Clause, amended the Import-Export Clause to permit the States to impose fees on exports for limited regulatory purposes. That such a power of taxation for the purpose of defraying regulatory costs was denied to the Federal government underscores the framers' intent to prohibit the Federal taxation of exports in all cases, regardless of regulatory purpose.[12]

D. The HMT Does Not Meet the Criteria for a User Fee Set Out in *Massachusetts* and *Evansville-Vanderburgh*

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[12] In any event, as the Court of International Trade aptly noted below, the export HMT has no regulatory purpose; it "neither seeks to regulate commerce nor repay the costs of services rendered". Pet. App. 60a.

Even assuming, *arguendo*, that the export HMT could be characterized as a "user fee", it would still not meet the criteria required of a valid fee under the test enunciated in *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), as it is not based upon a fair approximation of use and is excessive with respect to any benefit conferred.

A user fee need not be "precisely calibrated" to the extent of a party's private use of government-provided facilities, but need only be based on a "fair approximation" of use. *United States v. Sperry Corp.*, 493 U.S. 52 (1989). That the HMT is based on the value of exported articles, rather than on some approximation of port use, is manifest from the fact that the statute exempts from taxation numerous activities, both commercial (e.g., bunkering, ship fitting, fishing) and noncommercial (recreation), which in common understanding clearly involve the use of port and harbor facilities.

Further, the HMT is not calibrated with respect to the government's costs of providing harbor services to exporters. As the Federal Circuit aptly noted (Pet. App. at 21a-22a), the "*Massachusetts* case itself suggests that the cost of the benefits, rather than the value is the appropriate measure . . . ." However, even within the limited range of "commercial cargo" subject to taxation, the HMT is assessed without regard to the degree of port use. A large cargo of relatively inexpensive bulk ores, requiring a large ship and a deep draft port, will be assessed with less tax than a small cargo of more valuable precious metals or jewels, which make minimal use of port facilities. The HMT statute makes no distinction between

the two cargoes based on any rational measure of "port use", such as weight, volume, ship draft, displacement or types of port facilities used in the loading or unloading process; it falls on a purely *ad valorem* basis. Such an assessment is more representative of a "tax" or "duty" than of a charge recouping costs of port facilities.

That the HMT is excessive in relation to any benefit claimed to have been conferred on the payer is demonstrated by the fact that proceeds from the tax may be used to fund construction and maintenance projects which relate to future projects, rather than to repay the government for services actually rendered to the exporter. *See* Pet. App 60a. Indeed, the exporter paying the HMT may have received *no* services, if it has used a port where Federal maintenance funds have not been expended. Moreover, the fast-building surplus in the Harbor Maintenance Trust Fund, is indicative of the fact that the HMT is a tax, by Congress' own admission designed to raise revenue, and not a fee structured to recoup from exporters the costs of services rendered to them.[13]

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[13] It is also significant, *amici* assert, that export HMT revenues are covered over into the national Treasury before being remitted to the Trust Fund, and the tax is considered to be "on budget", meaning that HMT collections may be counted for deficit reduction purposes. Pet. App. 51a.

CONCLUSION

The Export Clause makes possible a "freedom of exportation . . . guaranteed by the Constitution", which, this Court has recognized, "cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance". *Fairbank v. United States*, 181 U.S. at 295. The broad sweep of the Export Clause makes clear that any form of taxation which falls upon exported articles in the course of their exportation is strictly prohibited.

The HMT taxes "Articles exported" during the course of their exportation more blatantly than any tax this Court has considered before. The tax violates the letter of the Export Clause and works the very results the Framer's sought to avoid. That the HMT may be nominally imposed for the avowed purpose of defraying the government's costs of "port use" (or of raising a sum of money corresponding to the government's port maintenance expenditures) cannot, and does not, alter the purpose of the Export Clause, as conceived by the framers and consistently interpreted by this Court. Taxes and duties on exports, such as those imposed by the HMT, are strictly prohibited. In this case, the Congress has wielded a power of taxation which the Constitution expressly forbids.

Amici submit that this Court should uphold the Federal Circuit's decision striking down the export HMT as repugnant to the Export Clause of the Constitution.

Respectfully submitted,

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